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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

IN RE CONAGRA FOODS, INC.

Case No. CV 11-05379-MMM (AGR_x),
MDL NO. 2291

CLASS ACTION

**PLAINTIFFS' OPPOSITION TO
CONAGRA FOODS, INC.'S *EX*
PARTE APPLICATION TO STAY**

Hon. Margaret M. Morrow

1 Plaintiffs, by their undersigned counsel, respectfully submit this
2 memorandum in opposition to Defendant ConAgra Foods, Inc.'s ("Defendant" or
3 "ConAgra") *Ex Parte* Application to Stay (Dkt. No. 433 ("Def. Mem.")).

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5 For the second time in little more than a year,¹ ConAgra is demanding that
6 this Court bring this litigation to a dead stop -- *ostensibly* because of purportedly
7 relevant developments in other, unrelated cases, but, *in reality*, because of its fear
8 that the tide of this litigation is turning against it. In support of its second
9 shutdown attempt, ConAgra speculates that the appeal of *Jones v. ConAgra Foods,*
10 *Inc.*, No. 14-16327 (9th Cir. filed July 15, 2014), a case in no way connected with
11 this litigation other than ConAgra also being the defendant there, will (i) "likely"
12 be consolidated with appeals of other, unrelated cases that (ii) have not yet but are
13 "likely" to be filed, and will (iii) "likely" address and resolve a bevy of vaguely
14 defined issues that have arisen this year in myriad other food-label cases. Def.
15 Mem. at 1-2. Based on this string of speculative contingencies, and the fact that
16 "most of" the other unrelated cases "were cited by at least one of the parties as
17 authority" at some point in *this* case, ConAgra suggests that the Court impose an
18 indefinite stay pending the resolution of the *Jones* appeal. *See* Def. Mem. at 2-3.²

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24 ConAgra's broad claim that *Jones* will resolve important (largely

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26 ¹ See Footnote 4, below

27 ² Indeed, ConAgra's entire argument is based on its erroneous contention that all cases relating to
28 the allegedly false "100% Natural" labeling of various food products are identical and that the
outcomes of those cases must be identical as well. ConAgra's argument is akin to contending
that flooding cases and drowning cases are identical because both involve water. Once that false
presumption is laid bare, ConAgra's arguments – and, thus, its entire motion – necessarily fail.

1 unspecified) issues before the Court is unsubstantiated. ConAgra's sudden bid for
2 a stay appears to be motivated by a wish to avoid the imminent entry of orders in
3 *this litigation that do not favor ConAgra. Indeed, the Jones appeal was filed over*
4 *five months ago.* If ConAgra believed the *Jones* would be determinative, it could
5 have brought this motion over the summer. ConAgra did not file this motion to
6 stay in August or anytime while it thought the Court would deny the motion for
7 certification, as it did in July. Yet, following this Court's preliminary indication
8 that it is inclined to grant the bulk of Plaintiffs' amended class certification
9 motion,³ and only after waiting until the eve of the scheduled December 30, 2014,
10 hearing on Plaintiffs' Motion to Compel, does ConAgra bring an *ex parte* motion
11 urging this Court to stay all proceedings in order to await the outcome of the *Jones*
12 appeal and other rulings.

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14 An Order staying this case pending resolution of the *Jones* appeal (or any
15 orders on the several other cases ConAgra cites) is inappropriate and would delay
16 proceedings to an unwarranted and unknowable degree.

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18 *Instead of a stay, simply adjusting* the schedule in this case, based on the
19 posture and realities of the present matter, is a far less drastic remedy that would
20 enable the parties to avoid any prejudice or hardship pending the outcome of the

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26 ³ The hearing on Plaintiffs' pending Motion to Compel Document Production from
27 Defendant ConAgra Foods, Inc. Relating to ConAgra's Late Production of
28 Documents is set for December 30, 2014. Dkt. No. 426. On November 24, 2014,
the Court took under advisement the Motion for Class Certification, after a
preliminary order largely favorable to Plaintiffs. Dkt. No. 424.

1 appeal of *Jones* or any other potential case whose outcome might prove relevant.
2 Such a remedy would also be appropriate following the Court's entry of the rulings
3 on the pending motions. The Court should therefore deny ConAgra's motion to
4 stay.
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6 **A. ConAgra Abuses the *Ex Parte* Mechanism**
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8 For the second time in this litigation,⁴ ConAgra brings an *ex parte* motion to
9 stay while providing no valid reason for invoking emergency review, let alone the
10 stay. As this Court has previously observed, "*ex parte* applications contravene the
11 structure and spirit of the Federal Rules of Civil Procedure and the Local Rules of
12 this court" and "impose an unnecessary administrative burden on the court and an
13 unnecessary adversarial burden on opposing counsel who are required to make a
14 hurried response under pressure, usually for no good reason." *Morales v.*
15 *Prolease PEO, LLC*, No. 11-CV-10389, 2011 WL 6740329, *1 (C.D. Cal. Dec. 22,
16 2011).
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20 In light of these considerations, "opportunities for legitimate *ex parte*
21 applications are extremely limited"; indeed, "the use of such a procedure should be
22 limited to instances in which: (1) there is the threat of immediate or irreparable
23 injury; (2) there is a danger that notice to the other party may result in the
24 destruction of evidence or the party's flight; or (3) the party seeks a routine
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27 ⁴ This Court previously denied ConAgra's "Ex Parte Application for Order Staying
28 Proceedings Pending Outcome of Referral to Food and Drug Administration."
Dkt. Nos. 171, 173.

1 procedural order that cannot be obtained through a regularly noticed motion.” *Id.*

2 ConAgra cites none of these factors, and none is present here. ConAgra
3 simply claims to have proceeded *ex parte* because it “likely” cannot obtain a
4 hearing date that ConAgra – which anticipates unfavorable orders on two pending
5 motions – would consider “timely.” (Def. Mem. at 1). That justification might
6 merit an expedited briefing and hearing schedule on a motion to stay, but does not
7 justify seeking *ex parte* relief for the stay itself, and forcing Plaintiffs to respond
8 within on 24 hours. Having failed to seek a briefing schedule from the Court prior
9 to bringing this motion *ex parte*, ConAgra succeeds only in imposing unnecessary
10 and unjustified burdens on the Court and Plaintiffs. For this reason alone, the
11 Court should deny the motion.
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16 **B. Reasonable Adjustment of the Discovery and Case Management**
17 **Schedule Will Avoid Hardship or Prejudice to the Parties**

18 Assuming that the Court has any interest in the issues addressed by
19 ConAgra, certain modest adjustments could instead be made to the discovery and
20 case management schedule – a point addressed by the Court at the conclusion of
21 the recent class certification motion hearing. An amended schedule will avoid
22 prejudice resulting from the pendency of other case rulings (i.e. a Rule 23(f) filing
23 by one or more of the parties in this litigation), while ensuring efficiencies that
24 would be lost if the litigation were allowed to lapse during the lengthy time frame
25 needed for Ninth Circuit appeals. For example, there is no reason to pause the
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1 resolution of Plaintiffs' fully briefed motion to compel set for December 30, 2014,
2 and, if granted in any part, to allow the Magistrate to order that production begin.
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4 The same applies for the pending deposition on the same day of a ConAgra
5 employee.

6 Additionally, as to ConAgra's argument about its anticipated Rule 23(f)
7 petition practice, Plaintiffs have been willing to discuss with ConAgra a joint
8 proposal based on the needs and realities of this case. Such an adjustment to the
9 schedule would ensure efficient and continued active litigation of *this* matter based
10 on the realities and posture of *this* case – rather than upon events that may occur in
11 other, unrelated cases. Because ConAgra's motion is improper and, at best,
12 premature,⁵ the Court should deny it.
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16 **2. The Relevant Factors Weigh Against Imposing a Stay**

17 Conceding there is no basis for granting a stay under Rule 23(f) (*see* Def.
18 Mem. at 7 fn.1), ConAgra appeals to the inherent power of the Court to control its
19 docket, relying on precedent the Court cited in its Order denying ConAgra's
20 previous *ex parte* stay motion. *See id.* at 5 (citing *Mediterranean Enters., Inc. v.*
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23 ⁵ As ConAgra states, its application for the stay “does not present a basis for a stay
24 pursuant to Rule 23(f),” because the Court's ruling on the motion for certification
25 is pending. Def. Mem. at 7 n.1. However, even upon entry of the Court's ruling
26 on the class certification motion and in the event of a Rule 23(f) motion by either
27 party, a stay would not be automatic. *See* Fed. R. Civ. P. 23(f). Moreover, as to
28 ConAgra's alternative argument that the Court should issue its ruling on
certification, but otherwise stay the case pending a ruling on Jones and the other
potential appeals, a stay would be unwarranted since ConAgra has failed to show
that the limited questions on appeal in *Jones* would be decisive here. Instead,
modification of the discovery and case management schedule would, at least as the
facts now stand, serve the same ends.

1 *Ssangyong Corp.*, 708 F.2d 1458, 1465 (9th Cir. 1983); *Levy v. Certified Grocers*
2 *of Cal., Ltd.*, 593 F.2d 857, 863-64 (9th Cir. 1979)); *see also* Order Denying
3 Defendant's *Ex parte* Application for an Order Staying Action Pending Outcome
4 of Referral to Food and Drug Administration, Aug. 12, 2013, Dkt. No. 173, at 3.

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6 As ConAgra concedes, three factors inform the Court's consideration of
7 motions to stay that are based upon judicially inherent power: (1) the possible
8 damage that may result from granting the stay; (2) the hardship or inequity a party
9 may suffer in the absence of a stay, and (3) "the orderly course of justice
10 measured in terms of simplifying or complicating of issues, proof, and questions of
11 law which could be expected to result from a stay." Def. Mem. at 5 (quoting
12 *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1110 (9th Cir. 2005)). The Court may
13 also consider "the stage in litigation, whether substantial discovery has already
14 taken place, and whether the matter has been set for trial." *Epistar Corp. v. Philips*
15 *Lumileds Lighting Co., LLC*, No. C 07-5194 CW, 2008 U.S. Dist. LEXIS 119891,
16 *7 (N.D. Cal. Apr. 2, 2008) (citation omitted). The party seeking a stay bears the
17 burden of proving the stay is warranted. *Clinton v. Jones*, 520 U.S. 681, 708
18 (1997). "[I]f there is even a fair possibility that the stay ... will work damage to
19 someone else," the party seeking the stay "must make out a clear case of hardship
20 or inequity." *Lockyer*, 398 F.3d at 1112 (quoting *Landis v. N. Am. Co.*, 299 U.S.
21 248, 255 (1936) (ellipses in *Lockyer*)).

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28 Here, ConAgra gives no weight whatsoever to the first factor: the damage

1 that the requested stay may cause. This damage includes the effects on discovery
2 in terms of potential loss of evidence, lost memories, lost time, and other
3 procedural inefficiencies, when litigation is suddenly ground to a halt. *See*
4 *Cartmill v. Sea World, Inc.*, No. 10CV00361 DMS (POR), 2010 U.S. Dist. LEXIS
5 11776, at *6 (S.D. Cal. Nov. 5, 2010) (denying stay based, in part, on fact that
6 indefinite duration occasioned “risk of evidence being lost or witnesses forgetting
7 relevant facts or relocating outside of the Court's jurisdiction”). Rather, ConAgra
8 simply asserts that “[t]he case has been pending for several years, through no fault
9 of ConAgra’s,”⁶ and that because the *Jones* appeal will be “briefed in February” and
10 indefinite stay cannot occasion possible damage. The reality, however, is that if
11 the *Jones* appeal is granted, years will elapse before resolution. Further, given the
12 discovery disputes, the parties would be better suited if they could have the
13 Magistrate Judge resolve various outstanding issues once the Court issues its class
14 certification ruling (which will frame the rest of merits discovery), and continue
15 discovery, and but do so in a way to accommodate the issues discussed above.
16 Accordingly, this factor goes against ConAgra’s request for an indefinite stay.

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23 As to the second factor, “[b]eing required to defend a suit, without more,
24 does not constitute a “clear case of hardship or inequity”” to support entry of a
25 stay. *Stanley v. Novartis Pharms. Corp.*, No. CV 11-03191 MMM (OPx), 2012
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27 ⁶ ConAgra’s apparent denial of responsibility for the pace of the litigation is belied
28 by the conduct of ConAgra and its various counsel, as reflected throughout the
record in this case.

1 U.S. Dist. LEXIS 61713, *10 (C.D. Cal. Apr. 13, 2012) (quoting *Lockyer*, 398
2 F.3d at 1112). Here, ConAgra's claim of "hardship" in the absence of a stay
3 pending a possible ruling on the *Jones* appeal (and resolution of issues in the
4 several other cases ConAgra cites) is belied by the facts: ConAgra seeks to avoid
5 its discovery obligations, the entry of a likely-unfavorable ruling on class
6 certification, and bringing this case to trial, knowing that a stay will result in loss
7 of case momentum. ConAgra's vague claim that absent an indefinite stay the
8 parties will "expend considerable resources preparing this discovery and briefing,
9 all of which will be based on the law as it now stands" is always the situation, and
10 insufficient given that ConAgra cannot show that the resolution of *any* particular
11 issue on appeal in *Jones* would result in a binding ruling on an issue that this Court
12 is likely to resolve in the interim.

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14 As to the third factor, the interest of the orderly course of justice, such will
15 not be aided by the sudden cessation of litigation here to await indefinite outcomes
16 in unrelated matters. As to this factor, ConAgra, again, incorrectly claims that the
17 issues on appeal in *Jones* and other cases are relevant here, as is addressed in the
18 next sections.

19 20 21 22 23 24 **2. Issues on Appeal in *Jones* Are Neither Dispositive Nor Relevant**

25 Any resolution by the Ninth Circuit of the issues on appeal in *Jones* will not
26 enable this Court to resolve issues that are, or are likely to be, before the Court in
27 this case. While ConAgra represents that *Jones* involves three different product
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1 lines (*see* Def. Mem. at 3), in fact the *appeal* on which ConAgra’s motion is based
2 is, according to plaintiff-appellant’s brief, “limited to *one* plaintiff and *one* product
3 line – Plaintiff Jones and Hunt’s canned tomato products” – and is further limited
4 to claims under California statutes, an unjust enrichment theory, and the
5 Magnuson-Moss Act.⁷ The first question presented by the appellant is whether the
6 district court erroneously imposed an “ascertainability” requirement, based on the
7 district court’s finding that some of the products sold to the members of the
8 putative class did not include the allegedly misrepresentative labels, and class
9 members were unlikely to “remember” whether they had bought the actionable or
10 non-actionable products. *Jones* (9th Cir.), Doc. No. 21, at 16. Here, ConAgra
11 does not claim that members of the proposed class purchased Wesson Oils whose
12 labels omitted the “natural” claims; thus, resolution of whether the district court’s
13 certification ruling properly considered the effects of non-actionable labels in
14 *Jones* will not inform the Court in the present case.

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16 The only other potentially relevant bases on which ConAgra claims a delay
17 to resolve *Jones* is appropriate (*see* Def. Mem. at 3) is the fact that the district court
18 in *Jones* rejected “price premium” and “regression” models. However, the
19 appellate court’s rulings, if any, on whether the district court properly rejected
20 these models will have little or no bearing on this case, because the primary basis

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27 ⁷ Emphasis added. The case was dismissed as to Plaintiff Christine Sturges a
28 month ago, following her motion to dismiss. *Jones v. ConAgra Foods, Inc.*, 14-
16327 (9th Cir.), Doc. No. 19.

1 of the *Jones* appeal is whether the district court improperly applied *Comcast* to
2 “rewrite the remedies available under state substantive laws,” *i.e.*, the “restitution”
3 remedies available under the California statutes (Unfair Competition Law and
4 False Advertising Law). *Jones* (9th Cir.), Doc. No. 21, at 35-36 (citing *Comcast v.*
5 *Behrend*, 133 S. Ct. 1426 (2013)). It may also be a very fact specific evaluation
6 and ruling based on the models presented in that matter, and thus have limited
7 applicability to the analyses of this Court.
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10 **3. Resolution of Other Cases ConAgra Cites Will Not Aid the Court**
11 **in Resolving the Issues Before It**

12 In addition to staying the case pending the appeal of the unrelated *Jones*
13 case, ConAgra speculates as to the “likely” appeals of the unrelated rulings in
14 *Brazil v. Dole Packaged Foods, LLC*, No. 5:12-cv-01831-LHK, and *Werdebaugh*
15 *v. Blue Diamond Growers*, No. 5:12-cv-02724, 2014 WL 2191901. Thus,
16 ConAgra apparently suggests that any stay entered by the Court should also
17 encompass the resolution of those cases as well as other food-related cases to
18 which ConAgra has pointed. Def. Mem. at 3-5. ConAgra’s position is meritless,
19 particularly, again, where the less drastic remedy of adjusting the discovery and
20 case-management schedule is available.
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22 Speculating as to what, if any, issues will be on appeal in these and the other
23 cases ConAgra cites may prove fruitless (*Jones* being but one example in which
24 litigants declined to seek appeal of significant rulings in the underlying decision).
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1 Nevertheless, in *Brazil*, summary judgment was granted on the basis that a sole
2 plaintiff's testimony "without more," was insufficient to survive a motion for
3 summary judgment – an issue that is not anticipated to be before the Court. *Brazil*,
4 No. 5:12-cv-01831-LHK, 2014 WL 6901867, at *5-6. In *Werdebaugh*, the court
5 decertified the damages class on the basis of the particular hedonic regression
6 model there, and Plaintiffs submit that this Court has already reviewed the one
7 submitted in this case, and will make its decisions based on the specifics presented
8 here. For similar reasons, *Lanovaz v. Twinings North America, Inc.*, No. 5:12-cv-
9 2646, 2014 WL 1652338 (N.D. Cal. Apr. 24, 2014), addressing a regression
10 damages model specific to that case, is inapposite.
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12 ConAgra's own description of *Bruton v. Gerber Products Co.*, No. 5:12-
13 cv002412, 2014 WL 2860995 (N.D. Cal. June 23, 2014), reveals that the case is
14 also inapposite, for reasons similar to those with respect to *Jones*. See Def. Mem.
15 at 4. The facts do not show that "only a subset of flavors" (or types of Wesson
16 Oils) were "sold with multiple labels" wherein some of the products were not
17 actionable. See *id.* Nor has ConAgra claimed that some of the Wesson Oils
18 purchased by members of the proposed classes were not labeled "natural." In any
19 event, ConAgra offers no basis for concluding that the specific issues to which
20 they point in their motion will be resurrected and resolved by the Court of Appeals
21 in *Jones*.
22

23 In sum, it is not reasonable for this Court and Plaintiffs to be asked to delve
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1 into the details of these other matters on an expedited basis, and speculate about
2 what issues may or may be raised or addressed on appeal, in a request for an
3 indefinite stay of the action. Instead, the focus should be on the needs of this case,
4 and Plaintiffs remaining willing to confer, and then present a joint proposal after
5 considering the Court's ruling on the pending motion for certification.
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8 Accordingly, Plaintiffs respectfully request that the Court deny ConAgra's
9 motion for an indefinite stay.

10 Respectfully submitted,
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12 _____
13 DATED: December 18, 2014

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15
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